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In the Best Interest of the Child: A Practical Guide to Child Custody Litigation

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IN "THE BEST INTEREST OF THE CHILD": A PRACTICAL GUIDE TO CHILD CUSTODY LITIGATION

*J. Randall Patterson**

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I. INTRODUCTION

"And the king said, Divide the living child in two, and give half to one, and half to the other."[1]

Since King Solomon was called upon to render the most famous child custody decision, the courts across the nation have seen an endless flow of child custody litigation either as separate lawsuits or as part of a divorce ending a marriage to which children were born. The context of this multifaceted issue may range widely from two natural parents battling over who has the right to rear their child, to complex lawsuits involving such issues as grandparent rights,[2] rights to an illegitimate

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1. *I Kings* 3:25.

2. *See infra* notes 120-128, 148-155 and accompanying text.

child,[3] the rights of a homosexual parent,[4] or domestic abuse.[5] While each child custody case will present certain novel issues, all such cases will share certain procedures and considerations that form the core of any custody lawsuit or lawsuit which determines the custody rights to a child.[6]

II. NONMARRIED PARENTS

When an illegitimate child is born, that child has only one legally recognized parent, its mother, who has an absolute right to custody of the child. When at a later time, the child is either legitimized[7] or an order of filiation is entered, the putative father is elevated to an equal position with the mother. It is a long established principle that both parents have an equal right to the custody of their minor children. "The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or earnings of such minor, or any other matter affecting the minor."[8] The crucial factor bestowing any custody rights at all upon the father of an illegitimate child is that he be legally recognized as the child's father.

In Mississippi, Sections 93-9-1 through 93-9-75 of the Code[9] provide statutory authority for most actions to establish paternity in that state. Under Section 93-9-9[10] "[p]aternity may be determined upon the petition of the mother, the child, or any public authority chargeable by law with the support of the child."[11] The purpose and application of this law, since, by negative implication excludes the putative father as a plaintiff, is to provide a mechanism through which irresponsible or uncooperative fathers can be forced to support their illegitimate children.[12] Most jurisdictions have adopted some similar statutory law.[13]

A quirk of law in Mississippi, however, is that if the putative father desires to have himself adjudicated as the legal father of an illegitimate child, thereby bestowing parental rights to the child, he may do so individually under the authority

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3. *See infra* notes 7-8, 137-46 and accompanying text.

4. *See infra* notes 104-08, 128-33, 152-54 and accompanying text; *see also* Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852 (1985); Michael P. Sullivan, Annotation, *Parent's Transexuality as a Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 59 A.L.R. 4th 1170 (1988); Wanda Ellen Wakefield, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R. 4th 1297 (1981).

5. Randall A. Buty, Comment, *Lawyering for the Abused Child: "You Can't Go Home Again"*, 29 UCLA L. REV. 1216 (1982).

6. It is of some import to note that Mississippi law on child custody is derived from several distinct sources that include statutes, divorce case law, child support or modification case law, and of course child custody law.

7. "An illegitimate child shall become a legitimate child of the natural father if the natural father marries the natural mother and acknowledges the child." MISS. CODE ANN. § 93-17-1(2) (Supp. 1991).

8. MISS. CODE ANN. § 93-13-1 (1972).

9. MISS. CODE ANN. §§ 93-9-1 through 93-9-75 (1972 & Supp. 1991).

10. MISS. CODE ANN. § 93-9-1 (Supp. 1991).

11. *Id.*

12. MISS. CODE ANN. § 93-9-7 (1972).

13. *See* S.C. CODE ANN. § 20-7-957 (Law. Co-Op. 1976), *see also* ARK. CODE ANN. §§ 9-7-109 & 9-10-107 (Michie 1987).

of Section 93-11-65,[14] or in the capacity of the next friend of the child under the authority of Section 93-9-9 of the Mississippi Code.[15]

It is also of some import that actions brought pursuant to Section 93-11-65 are subject to a general statute of limitations of three years,[16] which begins to run at the time of the child's birth. Actions filed pursuant to Section 93-9-9 may be commenced at any time prior to the child's eighteenth birthday.[17] Additionally, the Mississippi Supreme Court has held that the doctrine of laches cannot be applied to a paternity action brought on behalf of the child.[18]

> In order to apply laches in the case *sub judice,* the Court would have to find that an eight-year-old child was negligent in not previously anticipating her needs for education and maintenance . . . . To allow this would mean "depriv[ing] the child of that support which belongs to him [or her] for reasons over which the child has no control" . . . [and] would frustrate the legislature's intent expressed through its "Uniform Law on Paternity."[19]

Mississippi courts further do not bind the child by a determination of paternity adjudicated as part of a divorce to which the child was not a party.[20] As such, if there is a question of paternity, a child, although presumed legitimate due to his birth to a married woman who has since divorced, may individually file suit against the putative father at some later date.[21]

Interstate paternity actions are becoming more common, and are largely controlled by the availability of personal jurisdiction over the defendant. Such jurisdiction may vary to some extent, but must conform to constitutional requirements. In the recent case of *Jones v. Chandler,*[22] the putative father had been residing in Mississippi as a college student when the child was conceived.[23] When the mother later filed a paternity suit, the Mississippi court held that it had personal jurisdiction over the putative father even though he had since relocated to Tennessee.[24] The court attributed this personal jurisdiction to, the "begetting act" which it found had occurred within the State of Mississippi.[25]

> We find the statutory and common law sources adequate that we may, in a paternity and support action, declare this state's law to hold amenable to suit here a non-resi-

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14. "Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, whether or not having the actual custody of minor children, for the purpose of judicially determining the legal custody of a child." MISS. CODE ANN. § 93-11-65 (Supp. 1991).

15. MISS. CODE ANN. § 93-9-9 (Supp. 1991). *See* Vronsky v. Presley, 526 So. 2d 518 (Miss. 1988); Williams v. Williams, 503 So. 2d 249 (Miss. 1987); Grimsley v. Tyner, 454 So. 2d 482 (Miss. 1984).

16. MISS. CODE ANN. § 15-1-49 (Supp. 1991). *See also* Johnson v. Ladner, 563 So. 2d 1368 (Miss. 1990).

17. MISS. CODE ANN. § 93-9-9 (Supp. 1991).

18. McGlaston v. Cook, 576 So. 2d 1268 (Miss. 1991).

19. *Id.* at 1269 (quoting Wilson v. Wilson, 464 So. 2d 496, 499 (Miss. 1985)).

20. Baker v. Williams, 503 So. 2d 249, 254 (Miss. 1987).

21. *Id.*

22. 592 So. 2d 966 (Miss. 1991).

23. *Id.* at 968.

24. *Id.* at 972.

25. *Id.*

dent who, in this state, together with a resident of this state, begets a child that thereafter resides here without support from his putative father.[26]

As a result of the *Jones* holding, if the child is conceived outside of the state and the father is a non-resident, even if the mother and child are residents, Mississippi does not have jurisdiction over the putative father. Such situations must be dealt with under the Uniform Reciprocal Enforcement of Support laws (hereinafter "URESA").[27]

III. Essentials of a Contested Custody Case

A. Initial Client Interview

The first meeting with a prospective client in contested child custody litigation is extremely important in that during that interview, the attorney must assess the merits of the case and determine whether to accept the client's case. During this meeting, the attorney should listen carefully to all aspects of the client's background information, and special care should be taken to identify all potential strengths and weaknesses of the client's position. Additionally, it is important to inquire into the client's personal history and to identify any potential "skeletons in the closet" that might be used against the client at trial. Undoubtedly, if your client has a tainted past, the other side will know about it, and use it.

It is extremely important that at this first meeting fees be discussed openly with the client. Child custody litigation, if properly conducted, can be expensive, and the client should understand this on the front end. Specific expenses that should be addressed are discovery costs, expert witness fees, and attorney's fees. Additionally, billing policies should be explained in detail. If the client indicates an intention or inclination to unreasonably restrict discovery or the use of experts because of expense, it must be explained that these are usually crucial to a successful judgment in child custody litigation. If the client persists in such restrictions prior to accepting the representation, this client should be required to sign a waiver indicating that he or she understands the importance of experts in custody lawsuits and that by their choice, and against the advice of counsel, the lawsuit will be conducted under specified restrictions. When the client fully understands potential expenses and fees, an engagement letter should be utilized to reflect that understanding and the scope of the representation.

B. Case Background

To adequately prepare for successful child custody litigation it is crucial that an attorney have thorough and realistic appraisals of the client, the opponent, and the child. In that information gleaned from client interviews is usually biased, additional information must be sought. An excellent source of such information is the myriad of lay witnesses who have had routine contact with the parties or with the

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26. *Id.*

27. Miss. Code Ann. §§ 93-11-1 through 93-11-63 (1972 & Supp. 1991).

child. Such potential witnesses may include neighbors, church leaders, friends, or teachers. Teachers are a particularly valuable source of information in that they can not only convey their observations of the child and family, but can also provide input as to the child's academic performance or any changes in the child's social interaction. "Particular attention should be paid to reports of emotional instability, nail biting, incorrigibility, poor grades, tardiness and absences and the reasons therefore, and any sudden shift in the qualitative or quantitative aspects of any of the foregoing factors."[28] Household employees or neighbors can also be a valuable source of information on issues such as the conduct of the custodial parent or on how the child is cared for or disciplined. All such witnesses should be interviewed as early as possible.

An interview with the child who is the subject of the dispute is also important to the formulation of a successful case plan. The child should be questioned not only about his or her perception of each of the parties, but also about daily life or routines, and about his or her preference of custodial parent. The Mississippi Code provides:

> [I]f the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, and that it would be to the best interest and welfare of the children, and any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live.[29]

While the statute clearly gives the child the right to state a preference, the court may apply its discretion to determine if that choice is within the best interests of that particular child. The Mississippi Supreme Court, however, in *Polk v. Polk*[30] held that "when the chancellor denies a child his choice of custodial parent under § 93-11-65, then the chancellor must make on-the-record findings as to why the best interest of the child is not served."[31] It is important, therefore, not only to ascertain the child's preference, but also to identify the reasons for that preference so that the choice can either be bolstered or discredited at trial.

Another source of information that should not be overlooked is police records. These should be reviewed not only for indications of misconduct by the parties, but also for past misconduct by persons known to have routine exposure to the child through the parents. Such examination could reasonably produce facts that could be used to discredit the opponent, or that could make their life-style or choices seem adverse to the interests of the child.

If the family has used the services of a social worker at any time, those records should also be reviewed. It is likely that the social worker will be hesitant to release the records without a court order. In such circumstances, a subpoena *duces tecum* should be utilized. Additionally, medical records of the parties and of the

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28. RICHARD E. CROUCH, FAMILY LAW CHECKLISTS § 10-9 (1990).
29. MISS. CODE ANN. § 93-11-65 (Supp. 1991).
30. 589 So. 2d 123 (Miss. 1991).
31. *Id.* at 130.

children may provide relevant information. The question of privilege for such records, must be addressed on a case-by-case basis by the court.

C. Discovery

With a thorough case background, a discovery plan should be formulated and implemented in every child custody case. A request for admissions is a valuable mechanism through which the opponent can be confronted with, and required to respond to, accusations of misconduct or neglect of the child.

Written interrogatories propounded pursuant to the Mississippi Rules of Civil Procedure[32] may also provide general information about the opponent or home life and identify potential issues for examination during deposition. In preparing the questions, it is important to remember that the questions will most likely be answered with the assistance of counsel. Additionally, interrogatories are extremely important in that they may be used to ascertain the identity and anticipated testimony of expert witnesses the opposing side will use at trial. In *Schepens v. Schepens*,[33] the Mississippi Supreme Court vacated a chancellor's custody award due to the mother's lack of opportunity to prepare for and respond to an adverse expert witness.[34] The prevailing party had answered the mother's interrogatories identifying the expert only four days before trial, and the mother was denied a continuance that she requested for the purpose of additional preparation.[35] The court held that her inability to adequately respond to this surprise witness was grounds for the initial award to be vacated and the case remanded for additional testimony on the best interests of the children.[36] Questions designed to "pin down" the opponent are better saved for deposition where the response will be more spontaneous.

Depositions, although more expensive to use than interrogatories, are excellent discovery devices which may be used to gain information from parties and nonparties alike.[37] This information may be invaluable in trial preparation and, since the deposition is conducted under oath, may serve as a basis for the impeachment of the witness during the trial. Additionally, if for some reason a witness is later unavailable and, therefore, unable to testify at trial, the deposition testimony may be read into the record as evidence.[38] Deposition testimony should be taken as early as possible in the proceedings. This will provide an early information base and will likely avoid some of the hostility that will probably escalate as the lawsuit continues.

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32. MISS. R. CIV. P. 33.
33. 592 So. 2d 108 (Miss. 1991).
34. *Id.*
35. *Id.*
36. *Id.* at 110.
37. MISS. R. CIV. P. 30.
38. MISS. R. EVID. 804(b)(1).

D. Trial or Hearing

In most jurisdictions there is no right to a jury trial in child custody litigation; it will be tried by a chancellor or judge sitting alone.[39] Courtroom theatrics should be avoided in such lawsuits, and the evidence should be presented in such a way as to emphasize not only your client's position, but an overall interest in the child's welfare. One novel way to illuminate your client as the preferred parent for custody is through an "A Day in the Life of" video. Such a film should reflect normal daily activities and should emphasize a stable home environment.

The order of witnesses should be planned in such a way as to support or introduce the prior or subsequent witness. Additionally, the most powerful testimony should be presented first and last. The first testimony the judge hears will make an impression and create an expectation of what is to follow. The final witness is the last impression before a decision is made, so that testimony also should be strong.

In any contested custody case, regardless of the jurisdiction, there is a myriad of uses for expert testimony.

> The custody case provides fruitful ground for the use of experts, since not only professionals—such as doctors, psychologists, psychiatrists, teachers, social workers and members of the clergy—but also neighbors, friends, and relatives, because of their being parents, can qualify as experts and testify as to who should have custody. Therefore, the pool of lay experts from which counsel can draw is virtually limitless, and he should make full use of this opportunity in building his case. These non-professional witnesses can not only render opinions as experts, but can also usually supply at least some of the facts on which their opinions are based. Such testimony will provide the nucleus on which counsel's case is based.[40]

These experts are extremely important in custody litigation and will generally be utilized by both sides to bolster their position and to discredit the opposing side's expert. In such cases it has been held that a judge or chancellor may use his discretion with regard to the probative value of such expert testimony.[41] In *Torrence v. Moore*,[42] the chancellor discounted the testimony of the mother's expert, a clinical psychologist, and against the psychologist's recommendations, awarded custody to the father.[43] In affirming the custody award, the Mississippi Supreme Court held:

> It cannot be said that the chancellor is in error because he refused to substitute his judgment as to the best interests of the child with the judgment of the professional

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39. In the minority jurisdictions of Texas and Georgia, however, a contested child custody lawsuit may be tried before a jury. *See* Rodrigues v. Cohen, 377 N.W.2d 321, 328 (Mich. Ct. App. 1985); Davis v. Davis, 115 So. 2d 355 (La. 1959); Mandel v. Mandel, 439 N.Y.S.2d 576 (1981).

40. Edward J. Winter, Jr. & Brian R. Hersh, *Child Custody Litigation*, 22 AM. JUR. TRIALS 347, 392 (1975).

41. *See, e.g.*, Torrence v. Moore, 455 So. 2d 778 (Miss. 1984).

42. 455 So. 2d 778 (Miss. 1984).

43. *Id.*

witness. The ultimate determination of the best interests of the child is a determination to be made by the court.[44]

In its review of *Torrence,* the court further restated the principle that a chancellor's findings of fact in a custody lawsuit would not be disturbed on appeal unless manifestly wrong.[45] Generally, the standard of review in the appeal of a trial court's decision in a contested child custody case is abuse of discretion.[46]

When examining your expert, avoid stipulation as to his or her qualifications and establish them on direct. To properly establish foundation, question the expert as to: academic training, medical training, specialty training, specialty certification, publications, years in practice, years in specialty, and previous experience as an expert witness. On further direct examination, it is important to establish the amount of time he has spent with the child or parties or reviewing records in formulating his conclusion. With this foundation set, it is then appropriate to question the expert as to his or her conclusions and his or her basis for those conclusions.

In the cross-examination of an adverse expert, the obvious goal is to discredit the qualifications and/or opinion of that witness. If discovery indicates a weak area, thoroughly question the adverse expert on his qualifications or lack thereof. If discovery indicates impressive credentials, stipulate as to the adverse expert's qualifications. There is no reason to recite an impressive resume to the trier of fact. Cross-examination of the adverse expert should additionally attempt to identify any bias that the expert might personally harbor. Further cross-examination should explore the expert's actual opportunity to observe the child or the parties. If, for example, the expert failed to meet with your client, an obvious lack of basis for his opinion is present. If the adverse witness used any tests as the basis for his conclusions, attempt to bring the validity of the results into question. Appropriate areas of inquiry of this end would include the health of the child on the date the test was administered, reuse of a test that had been previously used with the child, or any deviations from the protocol of the test during its administration.

Professional experts may additionally be useful in cases in which physical abuse of the child is alleged. One novel and extremely accurate method of proving physical abuse is through the use of ultraviolet photography of the abuse sites on the child.[47] This advanced process, coupled with close scrutiny of bruise patterns,[48] is a means through which visual photographs of the child's abuse may be brought before the trier of fact. The impact of such evidence is most certainly much greater than that from oral testimony.

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44. *Id.* at 780. *See also* Pace v. Owens, 511 So. 2d 489 (Miss. 1987); Cheek v. Ricker, 431 So. 2d 1139 (Miss. 1983).

45. *Id. See also* Nichols v. Tedder, 547 So. 2d 766 (Miss. 1989); Devereaux v. Devereaux, 493 So. 2d 1310 (Miss. 1986); Carr v. Carr, 480 So. 2d 1120 (Miss. 1985).

46. Newsome v. Newsome, 256 S.E.2d 849 (N.C. Ct. App. 1979); Adams v. Adams, 59 S.E.2d 366 (Ga. 1950); Finnegan v. Finnegan, 58 S.E.2d 594 (W. Va. 1950).

47. Michael West & Robert Barsley, *Ultraviolet Forensic Imaging,* FBI LAW ENFORCEMENT BULLETIN (May 1992), at 14.

48. *See* William Jungbluth, *Knuckle Print Identification,* 39 J. FORENSIC IDENT. 375 (1989).

While examining witnesses, use all of the available tools of evidence. Use notebooks or diaries to refresh the memory of witnesses, or to discredit an opposing witness.[49] Additionally, in custody cases, the character of the parties is always at issue. Use reputation[50] and evidence of personal habits[51] to reflect your client's superior interest in the well-being of the child. If your client has "skeletons in the closet" that could not be eliminated before trial, bring those issues out on direct examination so that you can control the manner in which the negative information is presented to the court. If the "skeletons" are there, the other side will bring them out. By doing it on your terms, through a friendly witness, you can likely downplay the effect of the negative information and mitigate the adverse facts. If the "skeleton" is one that can be eliminated before trial, such as a live-in friend, eliminate it, and then address that issue on direct examination. This corrected circumstance can actually be used favorably as an illustration of the client's concern for the best interests of the child, and your client's willingness to make life-style adjustments in the interest of the child.

The fragile issues of character and reputation are often where much emphasis must be placed in trial to show why one parent should be granted custody over the other. As counsel targets these subjects, care should be taken not to engage in a game of "character-assassination" with the other side. It is perhaps a more effective strategy to recognize some of the opposing parent's good qualities, but then prove why your client is better suited to have custody. If the opposing parent is attacked too harshly, it may appear to the court as a power game, rather than litigation arising from a concern for the child's interest.

Generally, in a contested custody suit, it will be necessary to use the child who is the subject of the litigation as a witness. The law in Mississippi has traditionally given complete discretion to the trial judge as to whether to allow the child to testify in court proceedings. The competency or incompetency of children to testify is largely an issue within the sound discretion of the trial judge.[52] Before allowing the testimony of a child, however, "the trial judge 'should satisfy himself that the child has the ability to perceive and remember events, to understand and answer questions intelligently, and to comprehend and accept the importance of truthfulness.' "[53]

In *Jethrow v. Jethrow*,[54] the court, while voicing a general disapproval with the practice of calling children as witnesses, recognized a right of the parties to do so in divorce proceedings.[55] The court, however, left the chancellors with great discretion as to whether the testimony should be allowed. In its opinion, the court

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49. MISS. R. EVID. 612.
50. MISS. R. EVID. 405.
51. MISS. R. EVID. 406.
52. Wilson v. State, 221 So. 2d 100, 102 (Miss. 1969).
53. Jethrow v. Jethrow, 571 So. 2d 270, 272 (Miss. 1990) (quoting House v. State, 445 So. 2d 815 (Miss. 1984)).
54. 571 So. 2d 270 (Miss. 1990).
55. *Id.* at 274.

adopted the factors from the child custody case of *Crownover v. Crownover*[56] as the inquiry to be made by trial judges in their analysis of whether or not to exclude the child witness. The court held that the chancellor should consider: (1) the competency of the child to testify;[57] (2) whether the court has "[taken] great pains . . . to conduct an *in camera* conference with the child to determine the competency of the child, as well as the competency of any evidence which the child might present;"[58] and (3) "whether the best interests of the child would be served by permitting her to testify or be sheltered from testifying and being subjected to a vigorous cross examination."[59] Additionally, the court required that the trial judge formulate a report of his findings to be made part of the record.[60]

> A report of the essential material matters developed at the *in camera* conference should be made of record by the trial court and the court should state the reasons for allowing or disallowing the testimony of the child, and also note the factual information which the court developed from the conference with the child which would be considered by the court in its ultimate determinations in the case.[61]

The *Jethrow* court, after delineating the procedure by which the trial courts should consider the proposed testimony of a child concluded, "[w]e trust the Chancellors of our state . . . that in dealing with . . . cases which come through their courts that they will continue to look after the child's own best interest before permitting him to get on the witness stand."[62] Thus, while recognizing the right of a party to call a child as a witness, the court reiterated the chancellor's discretion and control of how that right may be exercised.

The closing statement should be succinct and should again highlight your client's positive attributes and the stability that he or she can provide for the child. Again the emphasis should be on how custody with your client is in the child's best interest rather than on what a bad person the opposing parent is.

E. Judgment and Other Considerations

When the trial court renders judgment, care must be taken in drafting the order to specifically address each relevant issue of the custody dispute. Some jurisdictions have mandatory language or provisions that must be included in custody orders. Such provisions generally require that each party provide the other with an address or telephone number or may require notice to the court of changes in residence status.[63] Further, the order should include provisions for the support of the child, insurance coverage, and the visitation of the non-custodial parent. If there is

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56. 337 N.E.2d 56 (Ill. 1975).

57. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990). The courts have traditionally used the test established by House v. State, 445 So. 2d 815 (Miss. 1984) to determine the competency of a child witness.

58. 571 So. 2d at 273 (quoting Crownover v. Crownover, 337 N.E.2d 56, 59 (Ill. 1975)).

59. *Id.*

60. *Id.* at 273.

61. *Id.* at 273-74.

62. 571 So. 2d at 274.

63. *See* MISS. UNIF. CHANCERY COURT RULE 8.06.

any question as to who will claim the child as a tax exemption, the order should address that. Additionally, if the non-custodial parent is to claim any of the children for tax purposes, the custodial parent should execute an IRS Form 8332. The Form 8332 is a waiver of exemption and it may be made for any specific year, or for all future years. This form must be attached to all income tax returns when the non-custodial parent claims a child as an exemption. Upon the conclusion of the case and entry of judgment, the client should be made to understand that a child custody award is always subject to modification.[64]

F. The Legal Standard

1. Jurisdiction and Venue

Pursuant to a jurisdiction's venue statute,[65] initial custody proceedings brought as part of an action for divorce should generally be filed in the county in which the defendant resides, or in the county in which the parties resided at the time of separation, if the plaintiff is still a resident of that county at the time of filing.[66] If the defendant is a non-resident, the action should be filed in the plaintiff's home county. The court having jurisdiction in family law matters generally has authority in any divorce to "make all orders touching the care, custody and maintenance of the children . . . ."[67] Additionally, pursuant to the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"),[68] the chancery or family court maintains jurisdiction over actions to modify existing custody orders if:

> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with the state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships; or
> (c) The child is physically present in this state and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
> (d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to

64. MISS. CODE ANN. § 93-5-24 (Supp. 1991).
65. *See* MISS. CODE ANN. § 93-5-11 (Supp. 1991).
66. *Id.*
67. MISS. CODE ANN. § 93-5-23 (Supp. 1991).
68. MISS. CODE ANN. §§ 93-23-1 through 93-23-47 (Supp. 1991).

determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.[69]

Based on the interests of the child, another state may assume jurisdiction of the matter upon petition by one of the parties and a showing that the second state is the more appropriate forum.[70]

2. Custody as Part of a Divorce Proceeding

A court of competent jurisdiction, when hearing an action for divorce may "as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage . . . ."[71] When custody is addressed as part of a divorce proceeding, it is awarded based upon the "best interests of the child."[72] Historically, family law courts have demonstrated little uniformity in custody awards, and have used the age of the child as the primary consideration in custody litigation. This "tender years doctrine" has now been generally eliminated as the sole factor in determining custody issues in most jurisdictions.[73] In *Albright v. Albright*,[74] the Mississippi Supreme Court eliminated this doctrine and enumerated several concrete factual considerations to guide the courts of that state in their determination of the "best interests of the child."[75]

Factors to be considered in ascertaining best interest, as stated in *Albright*, in addition to age are:

> health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.[76]

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69. MISS. CODE ANN. § 93-23-5(1) (Supp. 1991).

70. *See* Castleberry v. Castleberry, 541 So. 2d 457 (Miss. 1989).

71. MISS. CODE ANN. § 93-5-23 (Supp. 1991).

72. MISS. CODE ANN. § 93-5-24 (Supp. 1991). *See* Carr v. Carr, 480 So. 2d 1120 (Miss. 1985); Albright v. Albright, 437 So. 2d 1003 (Miss. 1973).

73. *See* Thomas R. Trenker, Annotation, *Modern Status of Maternal Preference Rule of Presumption in Child Custody Cases*, 70 A.L.R. 3d 262 (1976). *See also* COLO. REV. STAT. § 14-10-124 (Supp. 1991); N.Y. DOM. REL. LAW § 240 (Supp. 1992); VA. CODE ANN. § 20-107.2 (Supp. 1992).

74. 437 So. 2d 1003 (Miss. 1983).

75. *Id.* at 1005.

76. *Id.*

Traditionally, in many states a divorce granted due to marital fault[77] would operate to bar an award of alimony or child custody.[78] In those early decisions, the traditional morals imposed by the courts served largely to punish the offending spouse for his or her marital impropriety. "When a divorce has been properly granted because of adultery of [a spouse], she is not entitled either to alimony or to the custody of the children save temporarily as to an infant so young as not to permit separation from its mother . . . ."[79] It is now, however, firmly established in many jurisdictions that marital fault on the part of one of the parents does not operate as a bar to that parent being granted custody of the parties' children. In *Carr v. Carr,*[80] the court recognized that "[i]n earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault . . . . Generally, courts now [however] consider the best interest rule, not marital fault, as the primary guide in custody determinations."[81] The court in *Carr,* reiterated the *Albright* factors and held that "moral fitness is but one factor to be considered, and is a factor worthy of weight in determining the best interest of the child."[82]

This principle was recently applied in Mississippi in the case of *Retzer v. Retzer.*[83] In *Retzer,* the husband was awarded a divorce on the grounds of adultery, but the wife was awarded custody of their two children.[84] The court, in adjudicating the best interests of the children, relied extensively on the *Albright* factors and held that "[m]arital fault should not be used as a sanction in custody awards."[85]

In its review of the trial court's order in *Retzer*, the Mississippi Supreme Court held, "[t]his Court is 'bound by those findings unless it can be said with a reasonable certainty that those findings were manifestly wrong and against the overwhelming weight of the evidence' ".[86] The court found no such manifest error, and affirmed the chancellor's custody award in spite of marital fault.[87]

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77. *See* MISS. CODE ANN. § 93-5-1 (1972 & Supp. 1991). (Mississippi statutorily recognizes twelve grounds of fault for divorce: (1) Natural impotency at the time of marriage; (2) Insanity or idiocy at the time of marriage; (3) Bigamy; (4) Incest; (5) Pregnancy of wife by another at time of marriage; (6) Adultery; (7) Sentenced to penitentiary; (8) Desertion; (9) Habitual drug usage; (10) Habitual drunkenness; (11) Habitual cruel and inhuman treatment; (12) Incurable insanity). *Id.*

78. *See* Moody v. Moody, 211 So. 2d 842 (Miss. 1968); Anderson v. Watkins, 208 So. 2d 573 (Miss. 1968).

79. Winfield v. Winfield, 35 So. 2d 443, 444 (Miss. 1948). See Keyes v. Keyes, 171 So. 2d 489 (Miss. 1965); Hulett v. Hulett, 119 So. 581 (Miss. 1928).

80. 480 So. 2d 1120 (Miss. 1985).

81. *Id.* at 1122. *See also* Yates v. Yates, 284 So. 2d 46 (Miss. 1973).

82. *Carr,* 480 So. 2d at 1123.

83. 578 So. 2d 580 (Miss. 1990).

84. *Id.* at 581.

85. *Id.* at 599.

86. *Id.* at 600 (quoting Carr v. Carr, 480 So. 2d 1120, 1123 (Miss. 1985)).

87. *Id.* at 596.

In *Polk v. Polk*,[88] the court gave judicial interpretation to statutory law[89] which provides for a child to choose between parents in custody suits. While this opinion acknowledged the discretion of a chancellor in custody awards, it also placed great weight on the literal language of the statute. "We find that when the Chancellor denies a child his choice of custodial parent under section 93-11-65, then the Chancellor must make on-the-record findings as to why the best interest of the child is not served."[90] As a result of this holding, special emphasis must be placed on the testimony and intentions of children, twelve and older, in custody litigation.[91]

3. Modification of Child Custody

When a court enters an order adjudicating the custody of a child, that court maintains continuing jurisdiction over the subject matter and parties for the purpose of later modifications of that order.[92]

In most jurisdictions there is a two tier approach to affect the modification of a child custody order. Initially, the party seeking modification must show by a preponderance of the evidence that there has been, since the entry of the previous custody order, a substantial and material change of circumstances adverse to the interests of the child.[93] The court has expressly held that improvements or changes in the life-style of the noncustodial parent is insufficient to satisfy the first tier of the test.[94] Additionally, a severe decrease in the personal income of the custodial parent has been held insufficient to show a material change warranting a modification of custody.[95]

Immoral conduct on the part of the custodial parent may, under certain circumstances, constitute a substantial change in conditions sufficient to warrant a change of custody. In *Cheek v. Ricker*,[96] the court considered this issue, and in analogizing modification litigation to an initial divorce proceeding, held, "if the mother's indiscretions with another man do not, in a divorce action, constitute a *per se* barrier to an award of child custody, it makes no sense that such a barrier should be

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88. 589 So. 2d 123 (Miss. 1991).

89. MISS. CODE ANN. § 93-11-65 (Supp. 1991).

> Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, and that it would be to the best interest and welfare of the children, and any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live.

Id.

90. 589 So. 2d at 130.

91. *See* Jeff Atkinson, *Criteria for Deciding Child Custody in Trial and Appellate Courts*, 18 FAM. L. Q. 1 (1984).

92. MISS. CODE ANN. § 93-5-23 (Supp. 1991). *See* Reynolds v. Riddell, 253 So. 2d 834 (Miss. 1971). *See also*, N. SHELTON HAND, JR., MISSISSIPPI DIVORCE, ALIMONY AND CHILD CUSTODY § 20-1 (2nd ed. 1987).

93. Arnold v. Conwill, 562 So. 2d 97 (Miss. 1990); Pace v. Owens, 511 So. 2d 489, 490 (Miss. 1987); Rutledge v. Rutledge, 487 So. 2d 218, 219 (Miss. 1986).

94. Duran v. Weaver, 495 So. 2d 1355 (Miss. 1986).

95. Robinson v. Robinson, 481 So. 2d 855 (Miss. 1986).

96. 431 So. 2d 1139 (Miss. 1983).

erected in custody modification proceedings."[97] The court, in further explanation of its holding, opined:

> In divorce actions, as distinguished from proceedings for modification of custody, sexual misconduct on the part of the wife is not *per se* grounds for denial of custody. A husband may upon proof of his wife's adultery be granted an absolute divorce on that grounds and yet in the same case custody of the children may be awarded to the mother. This is because the test for custody is different from the test to be applied in determining whether the divorce should be granted. Child custody determinations are made by reference to the best interest of the child. Our cases well recognize that it may be in the best interest of a child to remain with its mother even though she may have been guilty of adultery.[98]

In *Phillips v. Phillips*,[99] the Mississippi Supreme Court reversed a modification of custody based solely on the custodial parent's sexual indiscretions. The court found no adverse effect on the child as a result of the parent's conduct.[100] As such, the legal standard for modification of custody was not met. Through its analogy of a modification proceeding to a divorce custody dispute, the court firmly established that improper conduct on the part of the parent, would alone fail to pass muster as a substantial change adequate to support a petition for modification of custody.[101]

In *White v. Thompson*,[102] the natural father and his parents sought a modification of custody based primarily on the custodial parent's lesbian relationship with her roommate.[103] In addition to the fact that the mother was a homosexual, the movants alleged that she had used drugs in the presence of, and had generally neglected the children.[104] The court affirmed the trial court's modification of custody which was based upon the mother's "financial situation, her past adulterous behavior, her marijuana use, and the lesbian relationship."[105] Although the court acknowledged multiple factors which could be construed as substantial changes adverse to the interest of the child, it held that the chancellor "could have relied almost entirely on [the lesbian relationship],"[106] as a basis for modifying custody.

In reviewing a change in circumstances to satisfy the requirements of the first tier of the test, the courts must consider all evidence relevant at the time of the initial order and compare it to all evidence relevant to circumstances at the time of the motion for modification.[107] If a sufficient change detrimental to the children's in-

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97. *Id.* at 1144-45.
98. 431 So. 2d at 1145 n.3.
99. 555 So. 2d 698 (Miss. 1989).
100. *Id.* at 701.
101. *Id.*
102. 569 So. 2d 1181 (Miss. 1990).
103. *Id.* at 1182.
104. *Id.*
105. *Id.* at 1183.
106. *Id.* at 1184.
107. Smith v. Todd, 464 So. 2d 1155, 1157 (Miss. 1986).

terest has occurred between those two specific points in time, then the first tier of the test is satisfied.

Once a movant has overcome the first tier of the standard, the courts must determine what custody arrangement would be in the best interest of the child.[108] "The second prerequisite to a modification of child custody is a showing that the best interest of the child requires the change in custody."[109] In addressing this issue, the courts again apply the *Albright*[110] factors[111] as are used in initial custody proceedings. If the court is satisfied under the *Albright* factors that it is in the best interest of a child that the movant be granted custody, then such a modification may be ordered.

4. Novel Issues in Custody Litigation

When there is more than one child in a dysfunctional family, the question of separating the children is certain to arise. The Mississippi Supreme Court addressed this issue in *Sparkman v. Sparkman.*[112]

> This Court has never adopted any *per se* rule to the effect that children should not be separated, in the absence of a showing of absolute necessity for the child's welfare . . . . [However], "[t]he court shall in all cases attempt insofar as possible, to keep the children together in a family unit. It is well recognized that the love and affection of a brother and sister . . . is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interests.[113]

As such, the standard in Mississippi is to keep siblings together absent unique circumstances.

The Mississippi Supreme Court addressed a novel issue in *Mord v. Peters.*[114] In this case, the mother, who had custody, objected to the children flying in a private airplane with their father during periods of visitation.[115] The court recognized the importance of the child's relationship with the noncustodial parent and held:

> [A]bsent a finding by the court that the non-custodial parent has acted without concern for the child's well-being or best interest, has demonstrated irresponsible con-

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108. Newsom v. Newsom, 557 So. 2d 511 (Miss. 1990); Phillips v. Phillips, 555 So. 2d 698 (Miss. 1989).

109. *Newsom,* 557 So. 2d at 516.

110. *Albright,* 437 So. 2d at 1005.

111. *Newsom,* 557 So. 2d at 516.

> Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child, a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Id. (quoting Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983)).

112. 441 So. 2d 1361 (Miss. 1983).

113. *Id.* at 1362 (quoting Mixon v. Bullard, 217 So. 2d 28, 30-31 (Miss. 1968)).

114. 571 So. 2d 981 (Miss. 1990).

115. *Id.*

> duct, . . . or finding that the activity which is questioned by the custodial parent presents a danger to the child's safety or well-being, neither the custodial parent nor the court may intervene to restrict activities during visitation.[116]

In its holding, the court granted great latitude to the non-custodial parent and placed significant emphasis on the autonomy of that parent's relationship with the child.[117]

Another situation in which the courts have historically recognized the strength of the parent-child relationship is in third party custody disputes. In the 1955 case of *Hendrix v. Hendrix*,[118] the paternal grandmother of the child petitioned the court for custody, alleging abandonment of the child by the parents.[119] The court, relying on *Hibbette v. Baines*,[120] reversed a trial court order awarding custody to the grandmother and returned custody of the child to the natural parent.[121] The principle of law that was dictated by these early cases was applied recently in *Bubac v. Boston*.[122] In that case, the parents, both in the military, were divorced by a Kentucky court which awarded joint custody, with the father having physical custody until such time that the mother could take the children with her.[123] The father placed the children with his mother who refused to give them up to their mother.[124] The Mississippi court recognized the validity of the Kentucky order and the superior position of a natural parent's right to custody.[125] " 'Simply stated, the natural parent is entitled to custody, as against a third party, unless one of the [following] conditions is clearly proved': (1) The parent abandoned the children; (2) The parent's immoral conduct adversely affects the children's interests; or (3) The parent is unfit to have custody."[126] The court found none of these had occurred in *Bubac*.[127]

In *Nancy S. v. Michele G.*[128] several unique theories of custody were advanced, and subordinated by the court to the paternal rights of the natural parent. In *Nancy S.*, the parties, who had been long term lesbian lovers, had the plaintiff artificially inseminated so that they could become parents on two separate occasions.[129] After their relationship dissolved, both asserted parental rights to the two children conceived.[130] The court, relying on the Uniform Parentage Act,[131] defined a parent as

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116. *Id.* at 985 (quoting Eichelberger v. Eichelberger, 345 S.E.2d 10, 12 (Va. 1986)).
117. *Id.* at 983.
118. 83 So. 2d 805 (Miss. 1955).
119. *Id.* at 805-06.
120. 29 So. 80 (Miss. 1900).
121. 83 So. 2d at 810.
122. 600 So. 2d 951 (Miss 1992).
123. *Id.* at 953.
124. *Id.*
125. *Id.* at 952.
126. *Id. at 956. See also* Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986).
127. 600 So. 2d 951, 956 (Miss. 1992).
128. 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).
129. *Id* at 214.
130. *Id.*
131. CAL. CIVIL CODE § 7001 (West 1983).

"one who is the natural or adoptive parent of a child,[132] and refused to recognize the defendant's assertion of parental rights under theories of *de facto* parenthood, *in loco parentis* or parenthood by equitable estoppel.[133]

Newmark v. Williams[134] also recognized the autonomy of the relationship between parent and child as being superior to any interests asserted by interested third parties. In that case, the parents who were members of the Christian Science faith, refused medical treatment for their child who was dying of cancer.[135] The Delaware Supreme Court reversed an award of temporary custody to the State holding "[t]he State's authority to intervene in this case, therefore, cannot outweigh the Newmark's parental prerogative and [the child's] inherent right to enjoy at least a modicum of human dignity in the short time that was left to him."[136]

In *State in Interest of J. W.F.*,[137] the court considered a case in which a man to whom the natural mother of a child was married but who was not the father of the child, sought custody.[138] The Utah court, while recognizing "the presumption of legitimacy . . . [absent] reasonable doubt,"[139] in this particular case due to the incompatible racial mix of the child and the lack thereof in the husband, held that the burden to rebut the presumption of legitimacy had been met.[140] The *J. W.F.* court further classified the "birth-husband" as a stepparent, thereby effectively eliminating any rights that he had to the minor child who had been born during his marriage to the mother.[141]

Stepparent rights to a child were also the issue in the Alabama case of *Shoemaker v. Shoemaker.*[142] In that case, the mother of the minor child had, in a property settlement agreement, agreed to allow the child's then stepfather specified visitation rights.[143] She later refused visitation, and a contempt action was brought.[144] The court held "the legal severance of the stepparent-natural parent relationship would also sever any legal relationship of the stepparent-stepchild for all practical purposes . . .,"[145] and denied the stepfather any visitation rights with the child.[146]

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132. 279 Cal. Rptr. at 215.

133. *Id.* at 219.

134. 588 A.2d 1108 (Del. 1991).

135. *Id.* at 1109.

136. *Id.* at 1118. *See also* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990); *In re* Cabrera, 552 A.2d 1114 (Pa. 1989); *In re* D.L.E., 645 P.2d 271 (Colo. 1982).

137. 799 P.2d 710 (Utah 1990).

138. *Id.* at 713.

139. *Id.*

140. *Id.* at 716.

141. *Id.*

142. 563 So. 2d 1032 (Ala. Civ. App. 1990).

143. *Id.* at 1030.

144. *Id.* at 1033.

145. *Id.* at 1034.

146. *Id.*

There are many cases, however, that have taken custody from the natural parents or upheld an award of custody to a third party. *Worley v. Jackson*[147] is a case in which the court upheld such a custody award and placed custody of the children with the paternal grandparents.[148] In *Worley,* the natural mother of the children was charged with the murder of the natural father, and was incarcerated.[149] Based on the mother's inability to care for the children, the court awarded custody to the children's grandparents.[150] The court did state in its opinion, however, that if the mother were to be released from prison, that she could seek a modification of custody back to her.[151] Another case in which the natural parent was divested of custody, with custody being granted to grandparents is *White v. Thompson.*[152] In *White,* the natural father and his parents jointly filed for a modification of custody due to the custodial mother's neglect of the children, and her involvement in a homosexual relationship.[153] The court affirmed the chancellor's decision that the mother's life-style was detrimental to the well-being of the children, and awarded custody to the paternal grandparents.[154] In *Matter of Marriage of Criqui,*[155] the court affirmed the denial of the natural mother's petition to modify custody back to her after she had voluntarily relinquished it some years earlier.[156] The court, while recognizing the "parental preference doctrine,"[157] declined to apply it to the *Criqui* facts because Mrs. Criqui had executed an agreed order, which had been entered, transferring custody of her children to the third party.[158] It was upon this vested legal custody in the third party that the court declined to apply the "parental preference doctrine," applied the best interests of the child test, and left custody unchanged.[159]

The mobility of families in today's society also interjects several unique issues into child custody disputes. In *Bell v. Bell,*[160] the court addressed one such issue when it considered whether to recognize an agreement made between the parents, and incorporated into their divorce decree, providing that neither parent could remove the children from the jurisdiction without the consent of the other.[161] The

147. 595 So. 2d 853 (Miss. 1992).
148. *Id.* at 855.
149. *Id.* at 853.
150. *Id.*
151. *Id.* at 855.
152. 569 So. 2d 1181 (Miss. 1990).
153. *Id.* at 1182.
154. *Id.* at 1185. The *White* court also determined that the natural father was unsuitable to have custody of the child for unspecified reasons concerning his financial situation and abuse of alcohol. *Id.*
155. 798 P.2d 69 (Kan. Ct. App. 1990).
156. *Id.* at 74.
157. *Id.* at 71. The "parental preference doctrine" presumes that a natural parent has an absolute right to the physical custody of their child against a third party with no legal claim to the child, regardless of the benefits to the child of remaining with the third party. *See* Christlieb v. Christlieb, 295 P.2d 658 (Kan. 1956).
158. 798 P.2d at 70.
159. 798 P.2d at 73. *See also Ex Parte* McLendon, 455 So. 2d 863 (Ala. 1984) (holding parental right to child was secondary to a legal transfer of custody executed by that parent).
160. 572 So. 2d 841 (Miss. 1990).
161. *Id.* at 843.

court held the order to be unenforceable.[162] "[W]e direct that our chancery courts refuse to approve any child custody agreement under section 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community."[163] As such, any agreement to restrict the relocation of the custodial parent, or the child, is against public policy and is void *ab initio*.[164]

A problem historically faced by courts, a petition for the modification of a custody order from another state, has been greatly alleviated by Mississippi's enactment of the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA").[165] UCCJA serves as the statutory authority for Mississippi courts to address, or to decline to hear, interstate custody cases.[166] Further, this act mandates Mississippi's recognition of custody decrees ordered by the courts in another jurisdiction,[167] and provides a means by which jurisdiction of the case may be transferred from one state to another.[168]

It is also of some import that the Mississippi Supreme Court has found the UCCJA an inappropriate mechanism through which to enforce the payment of child support awards.[169] "[T]he UCCJA expressly excludes from its coverage matters relating to child support or any other monetary obligations of any person."[170] Child support matters are rather under the auspice of the Uniform Reciprocal Enforcement of Support Act ("URESA").[171]

IV. SHORT-AND-LONG TERM EFFECTS ON ALL PARTIES

Although the fact-law patterns of child custody disputes are almost always different, a baseline commonality exists in that both the parents and the children in any such case will suffer some form of emotional trauma as a result of the litigation. The client should be reminded that although they are no longer spouses, they both still remain parents and should be encouraged to work together as much as possible on child rearing issues. Further, the client should be advised to refrain from making derogatory comments about the other parent to the child. Such verbiage accomplishes nothing and will generally lower the child's personal esteem. The client should additionally be encouraged to keep as much normalcy in the child's life as possible with regard to school, church, and social activities.

As to the legal consequences of a custody order, the client should be advised that a custody order is never absolute, and that it can be modified at a later date

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162. *Id.*

163. *Id.* at 846.

164. *Id.*

165. MISS. CODE ANN. §§ 93-23-1 through 93-23-47 (Supp. 1991).

166. Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990).

167. MISS. CODE ANN. § 93-23-25 (Supp. 1991).

168. MISS. CODE ANN. § 93-23-13 (Supp. 1991).

169. Carpenter v. Allen, 540 So. 2d 1334 (Miss. 1989).

170. *Id.* at 1336 (Miss. 1989); MISS CODE ANN. § 93-23-3(c) (Supp. 1991); *See also* Warwick v. Gluck, 751 P.2d 1042 (Kan. 1988); Burrill v. Sturm, 490 So. 2d 6 (Ala. Civ. App. 1986); Lee v. DeShaney, 457 N.E.2d 604 (Ind. Ct. App. 1983); Kloukis v. Kloukis, 440 A.2d 894 (Conn. 1981).

171. MISS. CODE ANN. §§ 93-11-19 to 93-11-21 (Supp. 1991).

upon a showing of a change in circumstances. Additionally, visitation provisions should be understood, along with the potential consequences for interference with visitation.

Emotions will generally be charged and hostile between the litigants. An effective family lawyer must recognize the fine line between legal counselor and social worker and never cross that line. Often some form of counseling is appropriate to maintain order and perspective for the parties and children. Such counseling is generally available at low cost or is covered by most major medical insurance plans, and clients should be encouraged to use such services.

V. JOINT CUSTODY

In most jurisdictions the award of joint custody in its different variations is controlled by statute.[172] In Mississippi, the Code provides specific circumstances under which the chancellor may make certain types of custody orders.[173]

Joint custody of a child is generally available as an alternative provided that the parents of the child were divorced on a no fault ground, and that both parents request that joint custody be ordered.[174] Further, most courts have discretion to award joint custody in other circumstances, "upon application of one (1) or both parents."[175] Although a court may exercise its discretion in any custody award if both parents agree to and seek joint custody, there is a presumption that such custody is in the best interest of the child.[176] Such an order may be tailored so as to allow physical and legal custody to both parents jointly,[177] physical custody to both parents with one having legal custody,[178] or legal custody to both parents with one having physical custody.[179] It is also of some import that the court, when presented with a request for a joint custody order may at its discretion require one or both parents "to submit to the court a plan for the implementation of the custody order."[180] In Mississippi, the legislature further anticipated the potential problems in having ex-spouses share custody, and required as part of any joint custody arrangement that the parents "exchange information concerning the health, education and welfare of the minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority."[181] The Mississippi statute additionally states that a joint custody order, like any child custody order, may be modified by appropriate legal action.[182]

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172. MISS. CODE ANN. § 93-5-24 (Supp. 1991).
173. *Id.*
174. MISS. CODE ANN. § 93-5-24(2) (Supp. 1991).
175. MISS. CODE ANN. § 93-5-24(3) (Supp. 1991).
176. MISS. CODE ANN. § 93-5-24(4) (Supp. 1991).
177. MISS. CODE ANN. § 93-5-24(1)(a) (Supp. 1991).
178. MISS. CODE ANN. § 93-5-24(1)(b) (Supp. 1991).
179. MISS. CODE ANN. § 93-5-24(1)(c) (Supp. 1991).
180. MISS. CODE ANN. § 93-5-24(1) (Supp. 1991).
181. MISS. CODE ANN. § 93-5-24(5)(e) (Supp. 1991).
182. MISS. CODE ANN. § 93-5-25(6) (Supp. 1991).

In *Torrence v. Moore*,[183] the court addressed one problem typically associated with a joint custody arrangement – instability in the life of the child. The court affirmed a modification of custody to only one parent, and "found that the advent of school age was a material change in circumstances that rendered the split of custody of the child useless and even harmful to the child."[184]

Another situation certain to stress the workability of joint custody is the relocation of one spouse. The *Bell*[185] decision, previously discussed, established judicially that parents could not, in anticipation of this problem, contract to rear the child in a specific community.[186] The geography of child rearing was also at issue in the Louisiana case of *Beard v. Beard*[187] in which the parents who had joint custody reached an impasse over where the child would attend kindergarten.[188] The court recognized the child's coming of school age as an adequate change of circumstances so as to defeat the spirit of joint custody, and placed primary custody with the mother.[189]

The Mississippi Supreme Court addressed a novel issue recently in *Bubac v. Boston*.[190] In that case, the parents had been granted joint custody by a Kentucky court, with the father having primary custody until such time that the mother could establish a home for the children.[191] During the period when the father had primary custody, he attempted to transfer custody of the children, unilaterally to his mother, who later refused to return the children to their mother.[192] The court recognized the mother's right to the children under the previous order, and expressly held that the father could not "transfer his right to custody of the children to whomever he selected . . . . This Court cannot accept such logic."[193]

While the concept of joint custody looks good on paper, it is generally unworkable in practicality due to its immense potential for conflicts. It is a fallacy of the court system to anticipate the long-term cooperation of ex-spouses on such a sensitive issue as child rearing.

VI. CONCLUSION

In a child custody lawsuit, it is imperative that the successful litigator use every available tool to present his client to the court as the more stable parent, who provides a safe and nurturing environment for the child. Further, it is crucial to instill in the client the idea that the best interests of the child are paramount. In this unique type of lawsuit, those best interests can often best be preserved through set-

183. 455 So. 2d 778 (Miss. 1984).
184. *Id.* at 780.
185. 572 So. 2d 841 (Miss. 1990).
186. *Id.* at 843.
187. 599 So. 2d 486 (La. Ct. App. 1992).
188. *Id.* at 488.
189. *Id.* at 489.
190. 600 So. 2d 951 (Miss. 1992).
191. *Id.* at 953.
192. *Id.* at 953, 955-56.
193. *Id.* at 955-56.

tlement rather than through full blown litigation. Additionally a disposition is generally more economically feasible for everyone involved.

In any litigation the court is burdened with the herculean task of weighing evidence, sorting exhibits, and determining the credibility of witnesses with the ultimate aim of rendering a just decision. In a case involving the rights to a child, the court's duty is magnified in that the force of that court's single decision will be felt, not only by the parties, but by that child for a lifetime.